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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

% *Judgment reserved on: 18.3.2014*

Judgment delivered on: 21.3.2014

+ Crl.A. No.161/2006

STATE

.... Appellant

Through Ms.Kusum Dhalla, APP

versus

HARBHAJAN SINGH

..... Respondent

Through Mr.Anil Soni, Adv.

INDERMEET KAUR, J.

1 This appeal is directed against the impugned judgment dated 13.4.1994 wherein the respondent Harbhajan Singh had been acquitted of the offence under Section 16 of the Prevention of Food Adulteration Act, 1954 (hereinafter referred to as the PFA).

2 The brief facts are as follows:

i. On 13.4.1994 at about 6.00 p.m. Food Inspector-Hukum Singh (PW-1) had purchased a sample of aerated water (Kanche wali bottles) from Anil Jail from his shop at Qutub Road, Sadar Bazar, Delhi where the said food articles were stored for sale. The

sample consisted of 9 sealed bottles of the same lot having an identical label declaration. The sample was divided into three equal parts; each sample consisted of three bottles; each part containing the sample was separately packed, fastened, marked and sealed according to the PFA Act and Rules. Panchnama Ex.PW-1/F was prepared at the spot.

ii. One counter part of the sample was sent to the Public Analyst in an intact condition. The report of the Public Analyst dated 05.5.1994 reads herein as under:

“Oberoi Lemonade. Sample in sealed glass bottle with a Label on it. Complies with Rule 32.

Appearance – Colourless sample of aerated water.

Test for coaltar dye – Negative

Sugar – 8.0%

Test for Saccharin – Negative

Test for Dulcin – Negative

Test for Cyclamate – Negative

Test for Mineral Acid – Negative

CO₂ present under pressure.

Test for Brominated Vegetable Oil – Negative

Total plate count per ml – 124 colonies/ml

Yeast and mould count per ml – Nil

Coliform count in 100 ml – 9300 colonies per 100 ml.

The sample does not conform to standards because total plate count exceeds the prescribed maximum limit of 50 colonies per ml & it contains a large no of coliform bacteria which should be absent in 100 ml. signed this 5th day of May, 1994.”

iii. Challan was filed. In the course of the trial the accused had exercised his right under Section 13(2) of the PFA and accordingly the second counter part of the sample was sent to the Director Central Forensic Laboratory (CFL) who vide his report dated 28.10.1994 also found the sample to be adulterated but for different reasons. The said report reads herein as under:

“1. Physical appearance- Colourless liquid free from sediments.

2. Total soluble solids *7.0%*

3. Test for presence of artificial sweeteners:

(a) Saccharin *Negative*

(b) Dulcin *Negative*

4. Test for presence of preservatives:

(a) Sulphurdioxide *Negative*

(b) Benzoic Acid *Positive*

5. Quantity of benzoic acid *187.5 ppm*

6. Added colouring matter *Absent*

7. Total sugars expressed as sucrose *6.12 percent*

8. Total plate count	7 per ml.
9. Coliform count	Absent
10. Yeast and mould count	Absent

And I am of the opinion that the sample does not conform to the standards of the carbonated water as laid down under the provisions of PFA Act 1954 and Rules thereof in that the benzoic acid content is more than the maximum stand of 120 parts per million.”

3 The trial judge on the basis of the aforementioned evidence oral and documentary had concluded that the accused is entitled to benefit of doubt and a consequential acquittal. The court concluded that the bottles were not sealed as contemplated under Rule 22 A of the said Rules. What had largely being weighed in the mind of the Trial Court was the fact that the samples which were taken were not property homogenized and not being a representative sample which was also evident from the fact that there were marked variations between the report of the Public Analyst and the report of the Director CFL. Accordingly, the accused was acquitted.

4 The State is in appeal. The State is aggrieved by the finding of the court below. Submission of the learned public prosecutor is that the

judgment is illegal, arbitrary and suffers from inherent infirmities. It is pointed out that it has come on record that the food article i.e. “Kanche Wali Bottles” which had been seized were 9 in number and each of them were independently sealed; as such the question of them being not properly sealed as per the PFA Rules did not arise. Further submission being that keeping in view the nature of the article i.e. Kanche Wali Bottles; had the bottle been unsealed the Kancha/marble would have dropped and there was every possibility of the sample at this stage itself to have become adulterated. Additional submissions being that the statements of PW-1 and PW-2 have been ignored; the court has also overlooked the fact that both the Public Analyst and the Director of CFL have concluded that the sample was adulterated. On all counts the judgments of the trial court is liable to reversed.

5 These arguments have been refuted by the learned counsel for the respondent. It is pointed out that the judgment does not suffer from any infirmity; an order of acquittal unless and until it is perverse cannot be interfered with lightly. Learned counsel for the respondent has placed reliance upon a judgment of the High Court of Madras reported as 1990

(2) PFA Cases 196 State by Public Prosecutor Vs. Muthukirshnan

submission being that facts of that case are almost similar; in that case bottles of aerated water had been drawn as a sample; the court had noted that the sealing procedure as contemplated in Rule 22 A of the PFA Rules has a positive intent and where the prosecution has failed to bring its case within the protective cover of Rule 22A a benefit of doubt has to be granted to the appellant. Reliance has also been placed upon 1992(1) PFA Cases 58 State of Punjab Vs. Daulat Ram where also a sample of carbonated water had been taken but the bottles had neither been opened nor their contents were mixed up; the samples were not divided into three parts by putting them in three separate dried and clean bottles; in this case also the Court had concluded that in such eventuality it cannot be said that such a sample was a representative sample. Reliance has also been placed upon a judgment of Punjab and Haryana High Court reported as 1981(II) PFA 351 Bhagwandass Vs. The State to support the same submission that where three bottles of aerated water were treated as three samples but the prosecution having failed to establish that the three bottles were of a uniform quality; benefit of doubt had accrued in favour of the appellant and he had been granted acquittal. Lastly reliance has been placed upon a judgment of a

Bench of this Court reported as 2012 Legal Eagle (DHC) 1844 Raja Ram Seth & Sons & Anr. Vs. Delhi Admn. to support his submission that where the report of the Public Analyst and of the Director of CFSL have varying contents, it cannot be said that the sample was a representative sample; benefit of doubt had accrued to the appellant in that case as well.

6 Arguments have been heard and record perused.

7 The version of the prosecution is that nine bottles of aerated water had been taken and divided into three bottles each to form three samples. It was not the case of the prosecution that the contents of each of the bottles were taken, mixed and thereafter the contents were divided into three equal parts comprising of three samples out of which one was sent to the Public Analyst. The contents of the nine bottles purchased from the respondent had not been opened and mixed. It was on this basis that the trial court had recorded a finding that there was no proper homogenization and the prosecution has failed to avail of the protective cover of Rule 22A of the said Rules. In this context PW-1 had admitted that there was no batch number or code number mentioned in the bottles thus it cannot be said that the bottles are of the same lot. Testimony of

DW-1 noting that he used to exchange empty bottles with filled up bottles and he used to supply bottles in loose and not in full carate as per requirement of the customer also remained unchallenged; which also went to establish that the sample was not of the same lot, batch and code and thus not a representative sample. In this context the trial judge had quoted the version observations made by the Bench of the Madras High Court in the Judgment of Muthukirshnan (supra) and the relevant observations recorded by the trial court read herein as under:

“In the judgment reported as State by Public Prosecutor vs. Muthukrishnan, 1990 (2) Prevention of Food Adulteration Cases 196, the Madras High Court observed regarding the applicability of Rule 22 A. The accused defended the case contending that the procedure adopted by the Food Inspector is against the rules since the nine bottles purchased by him were not mixed together before dividing the same into three portions of the purpose of sending the same for analysis. There is no allegation in the complaint that the presence of excess saccharin was injurious to health. The question was whether the bottles purchased from the accused would come under the meaning of sealed containers found in Rule 22 A of the Rules framed under the Act. It was held that the object of the Act seems to be that bottles or the packet should be so sealed which cannot be otherwise opened than by damaging the seal. There is no there is absolutely no material available in this case to come

to the conclusion that the bottles were sealed as contemplated under Rule 22 A would be applicable to the facts of the present case. Even if the contention of the learned Public Prosecutor is accepted, there is no evidence in this case that the packets were closed so that access to it was not possible without breaking. The Rule-making authority had deliberately used the word “sealed containers” with a particular purpose and therefore the accused is entitled to seek the protection of the Court when the prosecution has failed to bring the case within Rule 22 A. In the circumstances, certainly the accused is entitled to the benefit of doubt.”

8 While giving benefit of doubt to the respondent trial court had also relied upon the judgment of Daulat Ram (supra); observations recorded by the trial court is as follows:

“In the judgment reported as State of Punjab vs. Daulat Ram, 1992 (1) Prevention of Food Adulteration Cases 58, it was held that the sample was not representative where the Food Inspector had purchased nine bottles of carbonated water with cola essence by way of sample and the bottles were not opened not the contents were mixed. The samples were not divided into three separate parts of putting the same into three separate dry and clean bottles. The samples of three bottles each were taken and only one sample was sent to the Public Analyst. It is not the case of the complainant that the contents of these bottles for common. The contents of three separate and distant bottles might have not been uniform. One of the sample which was sent to the Public

Analyst cannot be said to be representative sample as none out of the nine bottles could be taken as a representative sample of each other regarding its contents. When sample is not representative, the prosecution must fall.”

9 There is no perversity in these fact findings recorded by the Trial Judge.

10 A Bench of this Court in MNU/DE/1009/2009 State Vs. Hardwari Lal also had an occasion to consider this aspect and noting that the judgment of the trial court acquitting the appellant on this count did not call for any interference as the ‘Kanche Wali Bottle’ in that case also had not been unsealed, mixed and then divided into three equal parts. Court had noted that Rule 22A of the PFA Rules could not taken advantage of by the prosecution. The order of acquittal had not been interfered with.

11 The difference in the two reports i.e. the report of the Public Analyst and the report of the Director of CFL also had marked variations; whereas the coliform count in 100 ml as per the report of the Public Analyst was 9300 colonies per ml, the Director CFL had noted the coliform content to be absent. The total plate count per ml. in the report of the Public Analyst is 124 colonies whereas per the report of the

Director CFL it was 7 per ml. Whereas the sugar content in the report of Public Analyst was 8.0% it was 6.12 % in the report of the CFL. Thus the variation in the two reports was also substantial.

12 The Supreme Court in this context in 124(2005) DLT 413 Kashi Nath vs. State has noted that where the difference between the two reports i.e. the report of the Public Analyst and the CFL is substantial, it cannot be said that the sample was representative; the conviction in that case was not sustained. The observations of the Apex Court in the case of Kashi Nath read herein as under:

“ A careful reading of the Supreme Court decision reveals that the certificate of the Director, CFL supersedes the report of the Public Analyst and is conclusive as regards the quality and standards of the sample tested. There is no quarrel with this and there can be none. But, this does not enable us to detract from the ratio of the Full Bench decision of this court in the case of *MCD v. Bishan Sarup* (supra) that even after such a certificate is issued by the Director, CFL, it would still be open to the accused to establish, if he can do so on concrete grounds, that the sample tested was not a representative one. To this extent, the argument raised by Mr. Sharma that once the certificate of the Director, CFL is obtained, then that is final and conclusive and the Public Analyst's report cannot be looked into at all for any purpose whatsoever, is not quite tenable. If the variation in the two reports is

substantial enough, then the Public Analyst's report can certainly be looked into to establish this variation so as to support the contention of the petitioner that the sample was not representative. As indicated above, the Director, CFL who was examined as CW-1 in cross examination, has clearly stated that if the content of common salt as quantified by the two experts would have a variation of more than 0.3%, then the samples would not be representative. This is an opinion of an expert and one has to go by it. In the facts of the present case, we find that the variation, as indicated above, is more than 0.3%. Therefore, on the facts of the present case, it can be said that the variation is beyond the acceptable range and would clearly imply that the samples were not representative. In view of this finding and in the background of the law which is well settled, no conviction can be sustained."

13 On no count does the impugned judgment call for any interference. Appeal is without any merit. Dismissed.

INDERMEET KAUR, J

MARCH 21, 2014

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